IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

STANLEY BOMANI CRUMPTON,	:	
	:	
Plaintiff	:	CIVIL ACTION NO. 02-2873
	:	
v.	:	
	:	
JOHN E. POTTER, Postmaster General, United States Postal Service,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of _____, 2002, upon consideration of the Defendant's Motion to Dismiss Complaint/ Motion for Summary Judgment and the Response, if any, it is hereby ORDERED that the Complaint is DISMISSED with prejudice.

BY THE COURT:

_____
KELLY, J.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
JOHN E. POTTER, Postmaster General, United States Postal Service,	:	
	:	
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS COMPLAINT/MOTION FOR SUMMARY JUDGMENT

Federal defendant moves to dismiss plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and, alternatively, pursuant to Rule 56. Plaintiff did not exhaust his administrative remedies as to his defamation claim and his harassment claim. In addition, the Federal Tort Claims Act does not include a waiver of sovereign immunity to permit a claim of defamation. Finally, plaintiff fails to state a claim of retaliation upon which relief can be granted because he has not been subjected to an adverse employment action. Therefore, this court should dismiss plaintiff's complaint pursuant to Rule 12(b)(6), or, alternatively, Rule 56. The reasons for this

motion are more fully set forth in the attached Memorandum of Law, which is incorporated herein by reference.

Respectfully submitted,

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Chief, Civil Division

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff's complaint must be dismissed, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6), or, alternatively, Rule 56. Plaintiff's District Court complaint accuses his Postal Service managers of defaming his character and harassing him based upon an incident where feces was found in the plaintiff's relay bags.

Plaintiff is currently a letter carrier who works at the Schuylkill Station in Philadelphia. It appears that plaintiff's defamation claim is based solely upon the actions that Postal Service supervisors took in attempting to investigate at least two incidents where feces was found in relay bags that were used by plaintiff on his route. In addition, it appears that plaintiff claims that he was harassed about the feces incident in retaliation for a prior incident when he allegedly reported finding a suspicious bottle with a white substance on it which he believed to be anthrax.

Plaintiff's complaint must be dismissed for several reasons. First, plaintiff's EEO complaint of discrimination charged the Postal Service with retaliation only, and not harassment. Therefore, the only claim that he has exhausted in the administrative EEO form is the retaliation claim. Second, plaintiff's retaliation claim must be dismissed for failure to state a claim upon which relief can be granted because he was not subjected to any adverse employment action. Third, plaintiff's defamation claim must be dismissed for two reasons: The Federal Tort Claims Act ("FTCA") does not waive sovereign immunity to prevent a claim for defamation and, even if it did, plaintiff did not file an administrative claim as required by the FTCA, thereby depriving this court a subject matter jurisdiction.

II. ARGUMENT

A. Legal Standard

In ruling on a motion under Rule 12(b)(6), the court must assume all well pleaded facts to be true for purposes of the motion to dismiss only. Conley v. Gibson, 355 U.S. 41 (1957). The courts have routinely held, however, that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." James W. Moore, et al., Moore's Federal Practice §12.34(1)(b)(3rd Ed. 1999) (quoting Fernandez-Montes v. Allied Pilots Association, 987 F.2d 278, 284 (5th Cir. 1993).

To the extent that the court does not look beyond the

pleadings or public records, this motion may be decided under Rule 12(b)(6). Benford v. Frank, 943 F.2d 609-612 (6th Cir. 1991). To the extent the court looks beyond the pleadings and public records, this motion may be considered as a motion for summary judgment. See, generally, Federal Rules of Civil Procedure 56. Should this motion be considered as a summary judgment motion, the court shall construe all facts and inferences in a light most favorable to the non-moving party and grant summary judgment only where the moving party has shown that there is no genuine issue of material fact. Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987). Once the moving party meets its burden, the non-moving party must provide specific facts that show that there is a genuine issue of material fact for trial, not raise some metaphysical doubt as to the material facts. Matsushita Electrical Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Hall v. Hebrank, et al., 1999 U.S. Dist. LEXIS 21679 (Jan. 19, 1999).

B. This court lacks subject matter jurisdiction over plaintiff's harassment claim because he did not exhaust this claim administratively.

Under 42 U.S.C. §20002-16(c), strict compliance with the exhaustion requirements as a condition precedent to maintaining a suit thereunder. Irwin v. Department of Veteran's Affairs, 498 U.S. 89, 94 (1990), rehearing denied, 498 U.S. 1075 (1991). It is well settled that issues that are not raised in an administrative EEO complaint cannot be raised in the District Court.

"The judicial complaint must be limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." Ang v. Proctor and Gamble, 932 F.2d 540, 545 (6th Cir. 1991).

Plaintiff's district court complaint does not state what type of harassment he claims that he was subjected to by his supervisors. However, his EEO complaint of discrimination dated January 9, 2002, identifies his claim as retaliation only. A copy of plaintiff's EEO Complaint of Discrimination is attached hereto as Exhibit A. He did not check any of the boxes that would identify his claim as any type of harassment, such as sex, race, religion or disability. He only checked the box for "retaliation". Accordingly, retaliation is the only claim that was investigated administratively. Therefore, to the extent that plaintiff intends to raise any claim other than a retaliation claim before the district court, it must be dismissed for failure to exhaust his administrative remedies.

C. Plaintiff's retaliation claim must be dismissed for failure to state a claim upon which relief can be granted.

A prima facie case of retaliation under Title VII requires a plaintiff to show that (1) he was engaged in activity protected by Title VII; (2) his exercise of protected activity was known to the Postal Service; (3) the Postal Service subsequently took an employment action adverse to him; and (4) a causal connection existed between the protected activity and the action. Farrell v. Planter's Lifesavers Co., 206 F.3d 271 (3rd Cir. 2000).

For purposes of this motion only, it will be assumed that

plaintiff had engaged in prior protected activity of which the Postal Service was aware at the time of the alleged retaliatory action, the inquiry concerning the feces found in the relay bag. However, plaintiff will not be able to establish that he was an "aggrieved individual" under the Title VII regulations because he was not subjected to an adverse employment action.

In order to state of claim of retaliation under Title VII, plaintiff must establish that he is "an aggrieved individual". See, generally, 29 C.F.R. 1614.101 et. seq. An aggrieved individual is one who has been subjected to an adverse action. An adverse action is a tangible employment action that results in a significant change in employment status, "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). "Not everything that makes an employee unhappy is an adverse action." Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996). Unfair or improper employment decisions are not tantamount to "adverse" employment actions.

Courts have held that "[m]ere discipline, without any corresponding change in the terms or conditions of employment, does not qualify as an 'adverse employment action' under Title VII." Evans v. Nine West Group, Inc., 2002 WL 550477 at *7 (E.D.Pa.) Similarly courts have held that being "watched over" at work does not constitute an adverse employment action. Boykins v. Lucent Technology Inc., 78 F.Supp 2d 402, 414 (2000).

Oral reprimand or unnecessary derogatory comments do not constitute adverse employment actions. Robinson, 120 F.3d at 1301; Hussein v. Genuardi's Family Markets, 2002 WL 56248 (E.D.Pa. January 15, 2002); Jenkins v. Philadelphia Housing Authority, 2001 WL 1298988 (E.D.Pa. October 24, 2001) (negative comments are not adverse employment action); Keen v. D.P.T. Business School, 2002 WL 24434 (E.D.Pa. January 9, 2002) (chewing out employee or assigning them the hottest office did not constitute adverse employment action). The Third Circuit has even held that written reprimands do not constitute an adverse employment action absent a showing that they effected a material change in the terms or conditions of plaintiff's employment. Weston v. Commonwealth of Pennsylvania, 251 F.3d 420, 431 (3rd Cir. 2001).

Even accepting every fact in plaintiff's complaint as true, plaintiff has failed to establish that he is an aggrieved individual because he has not shown that he was subjected to an adverse employment action. Plaintiff alleges that his manager "called me in his office and as me to confess for shiting in postal relay bags." (sic). Additionally, plaintiff alleges that six (6) days after that incident, his supervisor called him into his office again and "told me that "fasces was found in one of the relay bag that you deliver and I'm sick of this." (sic) Manager, Dan Ash, said, "We narrow it down to you this time, who else could done it." (sic)

Based upon the above facts set forth in plaintiff's district

court complaint, he is not an aggrieved individual and has not been subjected to any type of employment action, much less an adverse employment action that meets the standard under Title VII. Plaintiff has not alleged that he has been fired, demoted, reassigned or even disciplined in connection with the relay bag incident. Therefore, he has not been subjected to an adverse action. As such, Plaintiff has not stated a retaliation claim upon which relief can be granted and this court must dismiss the claim.

D. Plaintiff's defamation claim is barred by the Federal Tort Claims Act, 28 U.S.C. §2680(b).

1. The FTCA does not waive sovereign immunity to permit a claim for defamation.

Although the FTCA waives the government's immunity from suit, there are exceptions. Section 2680 of the FTCA lists the exceptions to its coverage and specifically provides that "the provisions of this chapter and §1346(b) of this Title shall not apply to - . . . (h) any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abusive process, liable, slander, misrepresentation, deceit, or interference with contract rights".

Courts that have considered the issue have uniformly ruled that slander and/or defamation of character actions are not covered under the FTCA waiver of sovereign immunity. Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989); Hoesl v. U.S., 629 F.2d 586 (9th Cir. 1980); Accardi v. United States, 453 F.2d 1239, 1240 (3d Cir. 1970); Wolk v. United States, 2001 WL 1735258 22419

(E.D.Pa.); Madden v. Runyon, 899 F. Supp. 217 (E.D.Pa. 1995); Ware v. U.S., 838 F. Supp. 1561 (M.D.Fl. 1993), reconsideration denied; Henderson v. Harris, 672 F. Supp. 1054 (M.D.Ill. 1987); Haywood v. U.S., 585 F. Supp. 590 (D.C. Mass. 1984); Rojas v. U.S., 660 F. Supp. 652 (D.P.R. 1987); Also, Thomas-Lazear v. FBI, 851 F.2d 1202 (9th Cir. 1998).

It is well settled, then, that the FTCA does not permit plaintiff's claim for defamation. Therefore, plaintiff's defamation claim must be dismissed for lack of subject matter jurisdiction.

2. Plaintiff did not exhaust his administrative remedies under the FTCA.

Even assuming for purposes of this motion only that this court were to find that the FTCA has waived sovereign immunity to permit a claim for defamation, it must be dismissed because plaintiff did not file an administrative claim.

The FTCA requires that an injured party who is harmed by the claimed negligence of a federal government employee present an administrative claim to the appropriate federal agency, specifying a sum certain amount. 28 U.S.C. §2675. The FTCA further requires that the agency be given an opportunity to adjudicate that claim before the injured party is authorized to bring suit. Id.

A review of administrative files reveals that Mr. Crumpton has not filed an administrative claim for defamation with the Postal Service pursuant to the FTCA. See, declaration of Richard

Teszner, attached as Exhibit B. Therefore, even if this court were to conclude that the FTCA allows claims for defamation against the government, plaintiff's defamation claim must be dismissed because he has failed to abide by the administrative requirements, thereby depriving this court of subject matter jurisdiction.[1]

III. CONCLUSION

The court lacks subject matter jurisdiction over plaintiff's harassment claim because he did not exhaust this claim administratively. Plaintiff also fails to state a claim of retaliation upon which relief can be granted because he was not subjected to an adverse employment action as required by Title VII.

In addition, Plaintiff's defamation claim must be dismissed because the Federal Tort Claims Act does not provide a waiver of sovereign immunity to permit a defamation claim against the Postal Service. Therefore, plaintiff's defamation claim must be

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[1]The injuries Mr. Crumpton claims, allegedly occurred in the course of his employment. Federal employees who sustain injuries in the performance of their duties are covered by the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §8101, et seq. Where an individual is covered under the FECA for an injury or condition, such coverage constitutes the individual's exclusive remedy against the United States. See 5 U.S.C. §8116(c); Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 193-194 (1983); DiPippa v. United States, 687 F.2d 14 (3rd Cir. 1982). Furthermore, FECA's legislative history confirms that FECA was intended to be a substitute for suits against the United States for tortious injury as authorized by the FTCA. Miller v. Bolger, 802 F.2d 660, 663 (3rd Cir. 1986). Accordingly, Mr. Crumpton's remedy for any injury he alleges to have sustained in the course of his employment must be under FECA, not the FTCA.

dismissed for lack of subject matter jurisdiction. Moreover, even if the FTCA permitted such a claim, it would be subject to dismissal for failure to exhaust administrative remedies.

For the reasons set forth above, the Postal Service respectively requests that this complaint be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Defendant's Motion to Dismiss Complaint/Motion for Summary Judgment was mailed postage pre-paid, this 2nd day of August, 2002, to the following:

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New Castle, DE 19720

SUSAN SHINKMAN